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8 HEALTH

9 UNITED STATES DISTRICT COURT OF CALIFORNIA

10 NORTHERN DISTRICT

11 CYNTHIA GUTIERREZ, JOSE HUERTA,  
SMH, RH and AH,

12 Plaintiffs,

13 v.

14 SANTA ROSA MEMORIAL HOSPITAL,  
15 ST. JOSEPH HEALTH and DOES 1-50,  
16 inclusive,

17 Defendants.

Case No.: 3:16-CV-02645-SI

**OPPOSITION TO PLAINTIFFS'  
MOTION FOR ORDER GRANTING  
LEAVE TO AMEND COMPLAINT  
TO ADD NEWLY DISCOVERED  
FICTITIOUSLY NAMED PARTIES  
AND NEW CAUSES OF ACTION  
FOR FRAUD AND RECKLESS  
NEGLECT**

Date: June 30, 2017

Time: 9:00 a.m.

Courtroom.: 1

Judge: Honorable Susan Illston

MSC Date: Not set

Pre-Trial Conf: 10/10/17

Trial Date: 10/23/17

22 COME NOW Defendants SANTA ROSA MEMORIAL HOSPITAL and ST. JOSEPH  
23 HEALTH SYSTEM (collectively "Defendants") and submit their Opposition to Plaintiffs'  
24 Motion for Order Granting Leave to Amend Complaint to Add Newly Discovered Fictitiously  
25 Named Parties and New Causes of Action for Fraud and Reckless Neglect.<sup>1</sup> As grounds

26  
27 <sup>1</sup> Please see Section F below for a full explanation as to the untimeliness of Defendants'  
28 Opposition.

therefor, Defendants state Plaintiffs' Motion will result in substantial prejudice to Defendants and is unduly delayed, in bad faith, and futile.

### I. INTRODUCTION

On February 25, 2015 at 0300, Cynthia Gutierrez presented to the Santa Rosa Memorial Hospital emergency department with complaints of congestion, cough, nerve pain, and shortness of breath. She suffered from longstanding medical conditions, which included diabetes and end-stage renal disease. At or around 0700, once the physicians believed Ms. Gutierrez was stable, she was discharged. At some point after her discharge, Ms. Gutierrez collapsed in the waiting room and required resuscitation. She was transferred to the intensive care unit and eventually to the Kentfield Rehabilitation Center.

### II. LEGAL ARGUMENT

In federal court, the right to amend a complaint after a responding pleading has been filed, is governed by Federal Rule of Civil Procedure 15(a)(2). Generally, leave to amend is freely given "when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend is not automatic, and the right to do so is within the sound discretion of the court. *Zenith Radio Corp v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The factors considered when determining if a Motion to Amend is appropriate are: "(1) undue delay, (2) bad faith, (3) prejudice to the opponent, and (4) futility of the amendment." *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986) (citing *Loehr v. Ventura County Community College District*, 743 F.2d 1310, 1319 (9th Cir. 1984).) Finally, a court may, in its discretion, deny an amendment if it would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

#### A. Defendants Take Do Not Oppose Amendment to Add New Defendants

Plaintiffs' Motion seeks leave to name additional defendants, specifically, the emergency department physicians who treated Ms. Gutierrez, Dr. Elliot Brandewene and Dr. Stewart Lauterbach, as well as their medical group, TeamHealth/Chase Dennis. Defendants Santa Rosa Memorial Hospital and St. Joseph Health System do not oppose the addition of these defendants.

**B. Plaintiffs' Motion to Amend Fails to Address, Explain, or Provide Any Argument as to Why the Two New Causes of Action Should be Permitted.**

As an initial matter, Plaintiffs' Motion to Amend does not in any way address the two causes of action they wish to add as part of their Second Amended Complaint. Plaintiffs have utterly failed to explain why their amendment should be permitted. They offer no explanation or analysis as to why Defendants would not experience substantial prejudice as a result of adding two causes of action, at least one of which completely changes the nature of this litigation. As noted above, leave to amend "is not automatic" and an explanation or argument as to why amendment should be permitted must be presented by the party requesting leave to do so. Here, Plaintiffs appear to have assumed amendment is automatic and have provided no explanation or argument in their favor for the Court to consider. For this reason, Plaintiffs' Motion to Amend is deficient, and Defendants respectfully request this Court deny the Motion to Amend.

**C. The Proposed Causes of Action for Fraud and Reckless Neglect Are Both Futile and Therefore Plaintiff's Motion to Amend Should Be Denied**

A court has discretion to deny a motion to amend if the proposed amendment would add causes of action, which would be an exercise in futility for the court. *Foman* 371 U.S. at 182. The permissibility of a "new issue, never even suggested before, lies in the sound discretion of the trial court." *Lamar* 577 F.2d at 955. It is not an abuse of discretion for a Court to deny amendment if the new causes of action would be futile. *Wilson v. American Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989) (citing *Glick v. Koenig*, 766 F.2d 265, 268-69 (7th Cir. 1985); *Wimes v. Eaton Corp.*, 573 F.Supp. 331, 335 (E.D. Wis. 1983). An amendment is futile if "it could be defeated on a motion for summary judgment." *Gabrielson* 785 F.2d at 766.

1. Plaintiffs' proposed reckless neglect cause of action would be defeated by a motion for summary judgment and therefore, this amendment should be denied.

Plaintiffs' Proposed Second Amended Complaint improperly includes Reckless Neglect as the Third Cause of Action. This is not an independent cause of action in California,

1 but rather an element of the Elder Abuse and Dependent Adult Civil Protection Act found at  
 2 Welfare and Institutions Code §§ 15600 et seq. On two separate occasions, Plaintiffs have  
 3 attempted to argue Ms. Gutierrez was a dependent adult. As noted by this Court, there is no  
 4 support in the code for such an expansive definition of “dependent adult.” On or about  
 5 December 13, 2016, this Court granted Defendants’ Motion to Dismiss Plaintiffs’ claim under  
 6 the Elder Abuse and Dependent Adult Civil Protection Act without leave to amend. Plaintiffs’  
 7 attempt to add a “reckless neglect” cause of action is an attempted end run around the Court’s  
 8 previous decision. Therefore, as the cause of action for reckless neglect would be futile, and  
 9 is directly related to a cause of action already dismissed by this Court, Defendants respectfully  
 10 request this Court deny the Motion to Amend to add this “cause of action.”

11       2. Plaintiffs’ proposed fraud cause of action would be defeated by a motion for  
 12       summary judgment and therefore, this amendment should be denied.

13       Plaintiffs’ Proposed Second Amended Complaint includes a meritless claim for fraud  
 14 as the Fourth Cause of Action. As with the claim for reckless neglect, this cause of action is  
 15 futile as it would be defeated on a motion for summary judgment.

16       On September 6, 2016, Plaintiffs’ propounded their Requests for Production of  
 17 Documents, Set One (“RFPD”), upon Defendants. *See* Declaration of Brett Schoel (“Schoel  
 18 Declaration”) at ¶ 3. Three days later, on September 9, 2016, Defendants produced, what they  
 19 believed at the time was a full set of Ms. Gutierrez’ medical records from Santa Rosa Memorial  
 20 Hospital. *See* Schoel Declaration at ¶¶ 4 & 5. These were the same records Defendants’  
 21 counsel, Brett Schoel, and the law office of La Follette Johnson, were using in their work on  
 22 this case. *See* Schoel Declaration at ¶¶ 5 & 6. In La Follette Johnson’s review of the records,  
 23 the references in several areas to “Dr. Lauterbach’s note that food was aspirated,”  
 24 “gastroparesis,” “aspiration pneumonia,” “resp obstr-food inhal,” and “pneumonitis due to  
 25 inhalation of food and vomit” led to confusion, as counsel could not locate such a note by Dr.  
 26 Lauterbach in the records. *See* Schoel Declaration at ¶¶ 7 & 8. As Dr. Lauterbach is neither a  
 27 party to this action nor an employee of Defendants, to prevent a potential violation of the  
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1 Health Insurance Portability and Accountability Act of 1996 (HIPAA), Defendants noticed his  
2 deposition. *See* Schoel Declaration at ¶ 9.

3 During the deposition, Plaintiffs' counsel, Doug Fladseth, noted on the record Mr.  
4 Schoel informed him "that he was not able to find" Dr. Lauderbach's note, and further asked  
5 Mr. Fladseth if he "even had that as part of the records that he'd [sic] been produced." *See*  
6 Schoel Declaration at ¶ 10. Dr. Lauderbach brought with him to the deposition a copy of the  
7 Patient Care Record dated February 25, 2015 (in the pDoc format), which included the  
8 addendum. Schoel Deposition at ¶ 11. The deposition went forward but was ended abruptly  
9 prior to completion due to Mr. Fladseth's desire to review peer review materials and the newly  
10 discovered addendum prior to completing his questioning of Dr. Lauderbach. *See* Schoel  
11 Declaration at ¶ 12.

12 After conclusion of Dr. Lauderbach's deposition, Defendants' counsel immediately  
13 began investigating why the medical records did not appear to be complete. *See* Schoel  
14 Declaration at ¶ 13. Upon further investigation, it was determined the medical records, which  
15 were produced to Defendants' counsel and subsequently, Plaintiffs' counsel, were printed in  
16 what is referred to as the custom ITS (imaging therapeutic services) format. *See* Declaration  
17 of Shari Titus ("Titus Declaration") at ¶ 3. This format was created as a way to quickly pull  
18 and print all reports created in ITS as opposed to having to pull each individually. *See* Titus  
19 Declaration at ¶ 4. Upon discovery and investigation into this matter, it was determined a glitch  
20 caused the report to print with a header called "addendum," however the information continued  
21 therein was from the original report, not the addendum. *See* Titus Declaration at ¶ 5. The  
22 electronic medical record used by providers in the hospital was not affected by this glitch and  
23 information in addendums was available to the providers in the electronic medical records. *See*  
24 Titus Declaration at ¶ 5. It was only recently the third-party vendor responsible for printing  
25 medical records for Santa Rosa Memorial Hospital and the hospital's Health Information  
26 Management staff learned the custom ITS report did not also include the addendums. *See* Titus  
27 Declaration at ¶ 6. Santa Rosa Memorial Hospital and Petaluma Valley Hospital were the only  
28

1 ministries (hospitals in the St. Joseph Health System) using this custom report. *See* Titus  
2 Declaration at ¶ 6.

3 The undisputed facts are: (1) the omission was an unintentional error which has been  
4 corrected; (2) Defendants were unaware of this glitch until Dr. Lauterbach's deposition; (3)  
5 the records in Defendants' possession were identical to those produced to Plaintiffs; (4) the  
6 complete records in the pDoc format have been printed and will be provided to Plaintiffs; and  
7 (5) this error and the explanation as to why it occurred has been outlined for Mr. Fladseth. *See*  
8 Schoel Declaration at ¶ 15.

9 Further, Plaintiffs' proposed cause of action for fraud contains allegations, including,  
10 but not limited to administration of Dilaudid, which are related to the medical malpractice  
11 claims against Defendants, and irrelevant to a claim of fraud. The allegations the addendum  
12 about food in the endotracheal tube was "intentionally concealed" and "it is the first and only  
13 document produced to date, including more than 30,000 documents previously produced by  
14 the hospital, that claim that during CPR, food was found to be obstructing Cynthia Gutierrez's  
15 [sic] airway" is patently false. *See* Schoel Declaration at ¶ 7 & 8. The medical records, which  
16 were provided to Plaintiffs in response to their Request for Production of Documents were  
17 identical to the ones Defendants had and, as noted above, contain several references to either  
18 the addendum or food in Ms. Gutierrez' airway. *See* Schoel Declaration at ¶ 7 & 8. Finally,  
19 Plaintiffs' claim of fraud is nonsensical as the information contained in the records, which  
20 Plaintiffs claim were "intentionally concealed," are supportive of Defendants' contention Ms.  
21 Gutierrez' collapse was not caused by the medical care provided at Santa Rosa Memorial  
22 Hospital.

23 The cause of action for fraud would be futile as it would be defeated by a motion for  
24 summary judgment. Plaintiffs have been informed of the reason for the omission and were  
25 aware of these facts prior to requesting leave to amend. Therefore, as Plaintiffs' Cause of  
26 Action for Fraud is futile, Defendants respectfully request this Court deny the Motion to  
27 Amend.



**D. Plaintiffs' Motion to Amend to Add Two New Causes of Action is Unduly Delayed and Therefore Should Be Denied**

The Court has discretion to deny a party's request to amend if the opposing party would suffer substantial prejudice if the amendment is granted. *United Union* 919 F.2d at 1402. Unexplained delay is not dispositive; however, it is still significant. *Epis, Inc. v. Fid. & Guar. Life Ins. Co.*, 156 F.Supp.2d 1116, 1132-33 (citing *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999)). Finally, "whether a litigant should be permitted belatedly to tender an entirely new issue, never even suggested before, lies in the sound discretion of the trial court." *Lamar v. American Finance System of Fulton County, Inc.*, 577 F.2d 953, 955 (5th Cir. 1978).

While delay alone is not dispositive when a court is considering a motion to amend, it is significant, especially when viewed in light of the futility of the Plaintiffs' requested amendment to add two causes of action as noted in Section C above. If Plaintiffs had reviewed Ms. Gutierrez' medical records, they would have noted, as Defendants did, there were references to the unintentionally omitted addendum and/or note. *See* Schoel Declaration at ¶ 7 & 8. Further, as noted above, it was at or around the time of the deposition of Dr. Lauterbach when both Plaintiffs and Defendants learned of the printing error that caused the inadvertent omission from the record, which is the basis for Plaintiffs' claims of fraud and reckless neglect. *See* Schoel Declaration at ¶ 10 & 11. It appears Plaintiffs delayed performing review of the medical record. Then, after learning about the error at Dr. Lauterbach's deposition, and despite Plaintiffs' knowledge as to the cause of the inadvertent omission, they waited until two months had passed to file this Motion to Amend, all the while implying they only wished to add additional defendants. *See* Schoel Declaration at ¶ 16-23.

Therefore, as Plaintiffs have unduly delayed filing their motion, which Motion they are aware is baseless, Defendants respectfully request this Court deny the Motion to Amend.

**E. The Addition of the Two Proposed Causes of Action Would Substantially Prejudice Defendants and Therefore Should Be Denied**

Defendants would be substantially prejudiced if leave is granted for Plaintiffs to amend their complaint to add claims of reckless neglect and fraud. First, the addition of these causes of action, are unduely delayed as Plaintiffs knew or should have known of them at or around the time they received the medical records from Defendants. If Plaintiffs had been diligent in their handling of this matter, the discrepancy would have been discovered at or before the time it was discovered by Defendants. At this point, the addition of these two causes of action would completely change the nature of this case since they add intentional torts and further claims for punitive damages. It has been clearly explained to Plaintiff that the additional allegations and proposed amendment is untenable. Further, granting leave to amend would result in substantial prejudice as it would require extensive expenditure of time and money to file a motion for summary judgment as to the two new causes of action, which are undeniably futile based upon a previous ruling of the Court and the Plaintiffs' own knowledge as to the facts in this matter. While the Federal Rules of Evidence favor a matter to be heard on the merits, it does not favor bringing an action that has no merit.

Therefore, as the Plaintiffs' proposed amendment would cause Defendants to suffer substantial prejudice, Defendants respectfully request this Court deny the Motion to Amend.

#### **F. Reason for Untimeliness of Opposition**

On May 18, 2017, Defendants received Plaintiffs' Motion Amend. *See* Declaration of Lynetta Goodwin ("Goodwin Declaration") at ¶ 3. Upon receipt, Lynetta Goodwin, Legal Secretary to Brett Schoel, calendared the June 30, 2017, hearing date for the Motion to Amend into the Prolaw calendaring program, which calculated the due date for the Opposition as June 22, 2017. *See* Goodwin Declaration at ¶ 3. This was the standard practice for calendaring dates in Prolaw. *See* Goodwin Declaration at ¶ 4. On June 13, 2017, it was discovered that an error had been made as to the due date of the Opposition. *See* Goodwin Declaration at ¶ 5. Plaintiffs and Defendants agreed to enter into a Stipulation By All Parties to a New Filing Schedule RE: Plaintiffs' Motion for Order Granting Leave to Amend Complaint. *See* Goodwin Declaration at ¶ 6. The Stipulation was filed on June 13, 2017. *See* Goodwin Declaration at ¶ 6. La Follette



1 Johnson has taken steps to avoid this error in the future including opening an official ticket  
 2 with Prolaw requesting investigation and correction of the error. *See* Goodwin Declaration at  
 3 ¶ 7

### 4 III. CONCLUSION

5 Plaintiffs' motion to amend the complaint to add a Third Cause of Action for Reckless  
 6 Neglect and Fourth Cause of Action for Fraud, must be denied. Plaintiffs' presented neither  
 7 an argument nor explanation as to why these heretofore unheard allegations would not cause  
 8 Defendants to suffer substantial prejudice. Both actions are futile and would be defeated by a  
 9 motion for summary judgment. Said motion would be based upon both a prior ruling of this  
 10 Court and facts, which are presently within Plaintiffs' knowledge. The futility of amendment  
 11 in conjunction with the undue delay and bad faith in requesting leave to amend would cause  
 12 Defendants to suffer substantial prejudice by completely changing the nature of the case.

13 Therefore, for the reasons set forth above, Defendants respectfully request this Court  
 14 DENY Plaintiffs' Motion for Order Granting Leave to Amend Complaint to Add New Causes  
 15 of Action for Fraud and Reckless Neglect.

16 Respectfully submitted,

17 Dated: June 13, 2017

LA FOLLETTE, JOHNSON,  
 DE HAAS, FESLER & AMES

19 By: /s/

20 BRETT SCHOEL  
 21 Attorneys for Defendants SANTA ROSA  
 22 MEMORIAL HOSPITAL and ST.  
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